

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
Case No. 7: 17-cv-242

BITCO General Insurance Corporation,

Plaintiff,

vs.

Stephanie Southerland, Executrix of the Estate of
Kenneth E. Marks and Heavy Haul Contractors,
Inc, d/b/a TKF House Movers

Defendants.

COMPLAINT FOR DECLARATORY
JUDGMENT

Plaintiff, complaining of the Defendants, alleges as follows:

INTRODUCTION AND JURISDICTION

1. Plaintiff, BITCO General Insurance Corporation (BITCO), brings this action for declaratory relief, pursuant to Rule 57 of the Rules of Civil Procedure and 28 U.S.C. §2201.

2. Plaintiff seeks a declaration that a policy commercial automobile insurance that BITCO issued to Heavy Haul Contractors, Inc. d/b/a TKF House Movers (hereinafter " Heavy Haul Contractors, Inc.") does not provide coverage for any claims arising from an automobile accident that occurred on April 7, 2016, in Onslow County, North Carolina, in which Kenneth Eugene Marks was injured.

3. Plaintiff is an Illinois corporation, licensed to underwrite insurance in the State of North Carolina and conducting business in this State. The Plaintiff's principal place of business is in Davenport, Iowa.

4. Upon information and belief, Stephanie Marks Southerland, Executrix of the Estate of Kenneth Eugene Marks, is a citizen and resident of New Hanover County, North Carolina.

5. Upon information and belief, the Estate of Kenneth Eugene Marks is being administered in the Pender County, North Carolina.

6. Upon information and belief, Heavy Haul Contactors, Inc. is a North Carolina corporation with its principal office in New Hanover County, North Carolina.

7. Jurisdiction is invoked pursuant to 28 U.S.C. §1332, as this action is between a citizen and resident of a foreign state and citizens of North Carolina and other states and the amount in controversy exceeds \$75,000.

8. Pursuant to 28 U.S.C. §1391, venue for this action properly lies in the Eastern District of North Carolina, Southern Division, because a substantial part of the events giving rise to this dispute occurred in the Eastern District of North Carolina.

9. Upon information and belief, the defendants in this action are the only individuals or entities that have a direct interest that would be affected or potentially affected by the declarations that the Plaintiff seeks by this action.

THE AUTOMOBILE ACCIDENT

10. On April 7, 2016, Kenneth Eugene Marks was driving his 2016 Toyota, VIN #5TFAW5F11GX51922, on US Highway 17, in Onslow County North Carolina.

11. On April 7, 2016, the vehicle operated by Kenneth Eugene Marks collided with a vehicle operated by Beth Anne Geistkemper.

12. Stephanie Southerland, Executrix of the Estate of Kenneth E Marks, has contended that the automobile accident of April 7, 2016 was caused by the negligence of Beth Anne Geistkemper.

13. Upon information and belief, the vehicle operated by Beth Anne Geistkemper was insured by a policy of automobile insurance issued by USAA Casualty Insurance Company (USAA).

14. Upon information and belief, the policy issued by USAA on the vehicle operated by Ms. Geistkemper provided liability insurance with a limit of \$100,000 per person for bodily injury.

15. Upon information and belief, USAA tendered its limits of liability coverage on the policy of insurance issued on the vehicle operated by Ms. Geistkemper.

16. Upon information and belief, Stephanie Southerland, Executrix of the Estate of Kenneth E Marks, accepted USAA's tender and signed a covenant not to execute upon Ms. Geistkemper, allowing Ms. Southerland to prosecute a civil action against Ms. Geistkemper for the purpose of establishing the Estate's right to recover any applicable UIM coverage but protecting Ms. Geistkemper from any exposure to personal liability.

THE UNDERLYING ACTION

17. Stephanie Southerland, Executrix of the Estate of Kenneth E. Marks, has asserted claims for the wrongful death of Kenneth E. Marks in the civil action *Stephanie Southerland, Executrix of the Estate of Kenneth E. Marks v. Beth Anne Geistkemper*, Case No. 17 CvS 3541 filed in Onslow County Superior Court in the State of North Carolina (hereinafter referred to as the State Court Action). A copy of the Complaint filed in the State Court Action is attached hereto as Exhibit A.

18. Stephanie Southerland, Executrix of the Estate of Kenneth E. Marks caused the Complaint in the State Court Action to be served upon the North Carolina Commissioner of Insurance, as process agent for BITCO.

19. As provided by N.C.G.S. §20-279.21, BITCO gave notice of its appearance in the State Court Action and responded to the allegations of the Complaint. BITCO is participating in the defense of said action.

20. In the underlying action, Stephanie Marks Southerland, Executrix of the Estate of Kenneth Eugene Marks, alleges, in substance:

a) On April 7, 2016, Kenneth Eugene Marks was operating his 2016 Toyota pickup truck on US Highway 17, in Onslow County.

b) At said time and place, Beth Anne Guistkemper negligently drove a 2008 Toyota SUV into the vehicle operated by Kenneth Eugene Marks.

c) Because of the negligence of Beth Anne Guistkemper and the collision between the vehicle operated by Ms. Guistkemper and Mr. Marks, Mr. Marks was fatally injured.

d) Stephanie Marks Southerland, as the duly appointed administrator of the Estate of Kenneth Eugene Marks is entitled to recover damages pursuant to N.C.G.S. §28A-18-2, including recovery for expenses for care, treatment and hospitalization of the decedent incident to the injuries resulting in his death, compensation for pain and suffering experienced by the decedent, compensation for the present monetary value of the decedent to the persons entitled to recover, including compensation for reasonably expected loss of net income of the decedent and loss of services, protection care and assistance of the decedent, and loss of society, companionship, comfort, guidance, kindly offices and advice of the decedent.

21. Upon information and belief, by the State Court Action, Stephanie Southerland, Executrix of the Estate of Kenneth E Marks, seeks to recover damages exceeding \$175,000.

THE POLICY

22. BITCO issued insurance policy CAP 3 627 875, effective from October 3, 2015 to October 3, 2016 to Heavy Haul Contractors, Inc., DBA TKF House Movers (the Policy).

23. A true and accurate copy of The Policy, as in effect on April 7, 2016, is attached hereto as Exhibit B.

24. Stephanie Southerland, Executrix of the Estate of Kenneth E. Marks, has given notice to BITCO of her intention to seek underinsured motorists benefits under the policy of insurance issued by BITCO to Heavy Haul Contractors, Inc.

25. The Policy provides for underinsured motorists coverage, with limit of \$1,000,000, subject to the terms and conditions of The Policy.

26. The Named Insured for the Policy was Heavy Haul Contractors, a corporation.

27. Where the Named Insured is a corporation, the policy defines who is an insured for purposes of underinsured motorists coverage as follows:

If the Named Insured is designated in the declarations as:

2. A partnership, limited liability company, corporation or any other form of organization, then the following are “insureds”:

- a. Anyone “occupying” a covered “auto” or a temporary substitute for a covered “auto”. The covered “auto” must be out of service because of its breakdown, repair, servicing, “loss” or destruction.
- b. Anyone for damages he or she is entitled to recover because of “bodily injury” sustained by another “insured”.
- c. The Named Insured for “property damage” only.

28. For underinsured motorists coverage, the Policy describes covered autos as: “Only those “autos” described in Item Three of the Declarations for which a premium charge is shown

(and for Covered Autos Liability Coverage any “trailers” you don’t own while attached to any power unit described in Item Three).”

29. The Policy, as in effect on April 7, 2016, described six covered autos in Item 3 of the Declarations, including the following:

- a. 1999 GMC/Chevy C Series 4x2, Serial Number 1GDJ7H1D7XJ519403
- b. 1994 Ford Truck, Serial Number 1FDXK84EORVA00864
- c. 2005 Hudson Trailer, Serial Number 10HHTDD651000174
- d. 1991 GMC Topkick, Serial Number 1GDG6H1P3RJ515987
- e. 1999 OSH Kosh Pull Tractor, Serial Number 10TGJ9Y8066724
- f. 2008 Mack 4x2 Pinnacle, Serial Number 1M1AW07YX8N002268

30. The underlying complaint alleges that the vehicle that Kenneth Eugene Marks was operating on April 7, 2016 was a 2016 Toyota pickup truck.

31. The vehicle that Kenneth Eugene Marks was operating on April 7, 2016 was not a described vehicle under the Policy as of April 7, 2016.

32. The vehicle that Kenneth Eugene Marks was operating on April 7, 2016 was not a covered auto under the Policy as of April 7, 2016.

33. Kenneth Eugene Marks was not a Named Insured under the Policy on April 7, 2016.

34. Kenneth Eugene Marks was not a defined insured under the Policy on April 7, 2016.

35. The Estate of Kenneth Eugene Marks is not entitled to recover underinsured motorists benefits from BITCO by virtue of the Policy.

36. The heirs of Kenneth Eugene Marks are not entitled to recover underinsured motorists benefits from BITCO by virtue of the Policy.

PRESENT CONTROVERSY

37. Stephanie Southerland, Executrix of the Estate of Kenneth E. Marks, has filed a civil action for the purpose of establishing the Estate's claims for underinsured motorists benefits.

38. Stephanie Southerland, Executrix of the Estate of Kenneth E. Marks has caused the Complaint in the State Court Action to be served upon BITCO.

39. BITCO has appeared in the State Court Action and is participating in that action.

40. There is a real and genuine need for a declaration of this Court that the policy of insurance issued by BITCO to Heavy Haul Contractors, Inc. does not provide underinsured motorists coverage to the Estate of Kenneth E. Marks or to the heirs of Kenneth E. Marks for the fatal injuries which Mr. Marks sustained on April 7, 2016.

41. The declaratory relief requested will serve a useful purpose in clarifying the legal relations associated with the policy of insurance described in this Complaint, thereby promoting an expeditious resolution of the underlying dispute described in this Complaint and promoting judicial economy.

42. All conditions precedent to the initiation and maintenance of this action have been complied with or have occurred, or have been waived.

WHEREFORE, BITCO General Insurance Corporation prays:

1. That the Court entering judgment declaring that the policy of insurance issued by BITCO General Insurance Corporation to Heavy Haul Contractors, Inc., Policy No. CAP 3 627 875, does not provide coverage for the underinsured motorists claims asserted by Stephanie Southerland, Executrix of the Estate of Kenneth E. Marks.

2. That the costs of this action be taxed to parties other than BITCO General Insurance Corporation; and

3. That the Court grant to BITCO General Insurance Corporation such other relief as may be just and proper.

This the 15th day of December, 2017.

/s/ B. Danforth Morton
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